

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

10 ROY'LAND RICE,

Case No. 1:17-cv-01180-MJS (HC)

11 || Petitioner,

ORDER DIRECTING CLERK'S OFFICE TO ASSIGN A DISTRICT JUDGE TO THIS MATTER

13 || A. HARRIS,

FINDINGS AND RECOMMENDATION TO DISMISS PETITION FOR LACK OF JURISDICTION

14 Respondent.

THIRTY (30) DAY OBJECTION DEADLINE

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus 17 pursuant to 28 U.S.C. § 2241. He complains that his institution is denying inmates fresh fruits and vegetables.

I. Procedural Grounds for Summary Dismissal

The Rules Governing Section 2254 Cases in the United States District Courts are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241. Rule Rule 1(b). Habeas Rule 4 requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court[.]” Rule 4.

1 The Court may dismiss a petition for writ of habeas corpus either on its own
2 motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer
3 to the petition has been filed. Advisory Committee Notes to Rule 8, 1976 Adoption; see
4 Herbst v. Cook, 260 F.3d 1039, 1042–43 (9th Cir. 2001). A petition for habeas corpus
5 should not be dismissed without leave to amend unless it appears that no tenable claim
6 for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th
7 Cir. 1971).

8 || II. Discussion

25 In this case, Petitioner's complaints involve the conditions of his confinement, not
26 the execution of his sentence. He seeks injunctive relief requiring the institution to cease
27 serving certain foods and to begin serving others. He also seeks monetary damages.

1 These claims are not cognizable in habeas corpus and should be dismissed. It does not
2 appear that any tenable claim for relief could be pleaded, even if leave to amend were
3 granted. Jarvis, 440 F.2d at 14. Should Petitioner wish to pursue his claims, Petitioner
4 must do so by way of a civil rights complaint pursuant to Bivens.

5 **III. Conversion to Civil Rights Action**

6 In an appropriate case a habeas petition may be construed as a civil rights
7 complaint. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S. Ct. 407, 30 L. Ed. 2d 418
8 (1971). Although the Court may construe a habeas petition as a civil rights action, it is
9 not required to do so. Since the time when the Wilwording case was decided there have
10 been significant changes in the law. For instance, the filing fee for a habeas petition is
11 five dollars, and if leave to proceed in forma pauperis is granted, the fee is forgiven. For
12 civil rights cases, however, the fee is now \$350 and under the Prisoner Litigation Reform
13 Act the prisoner is required to pay it, even if granted in forma pauperis status, by way of
14 deductions from income to the prisoner's trust account. See 28 U.S.C. 1915(b)(1). A
15 prisoner who might be willing to file a habeas petition for which he or she would not have
16 to pay a filing fee might feel otherwise about a civil rights complaint for which the \$350
17 fee would be deducted from income to his or her prisoner account. Also, a civil rights
18 complaint which is dismissed as malicious, frivolous, or for failure to state a claim would
19 count as a "strike" under 28 U.S.C. § 1915(g), which is not true for habeas cases.

20 In view of these potential pitfalls for Petitioner if the petition were construed as a
21 civil rights complaint, the Court will recommend the case be dismissed without prejudice
22 to Petitioner presenting the claims in a civil rights complaint pursuant to Bivens v. Six
23 Unknown Named Agents, 403 U.S. 388 (1971), rather than a habeas petition. Any such
24 complaint will be assigned a separate civil number.

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1 **IV. Recommendation**

2 Based on the foregoing, it is HEREBY RECOMMENDED that the petition be
3 dismissed without prejudice to Petitioner's right to file a civil rights action pursuant to
4 Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

5 The findings and recommendation are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
7 **thirty** (30) days after being served with the findings and recommendations, Petitioner
8 may file written objections with the Court and serve a copy on all parties. Such a
9 document should be captioned "Objections to Magistrate Judge's Findings and
10 Recommendations." Petitioner is advised that failure to file objections within the specified
11 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834,
12 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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14 **IT IS SO ORDERED.**

15 Dated: September 12, 2017

16 /s/ *Michael J. Seng*
17 UNITED STATES MAGISTRATE JUDGE

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